Supreme Court, U. S.
FILED
OCT 12 1978
MICHAEL RODAK, JR., CLERK

No. 78-621

In the Supreme Court of the United States

October Term, A.D. 1978

VILLAGE OF CARPENTERSVILLE, a Municipal Corporation,

Appellant,

vs.

EDWARD LIMPERIS, Trustee,

Appellee.

Appeal from the United States Court of Appeals for the Seventh Circuit.

JURISDICTIONAL STATEMENT

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vs.

EDWARD LIMPERIS, Trustee,
Appellee.

Appeal from the United States Court of Appeals for the Seventh Circuit.

JURISDICTIONAL STATEMENT

Reference to the Official and Unofficial Reports of the Opinions Delivered in the Courts Below.

The opinion of the Circuit Court of Appeals for the Seventh Judicial Circuit has not yet been reported. It is reprinted in full as Appendix I in this Statement (App. pp. 1-8).

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, has not been reported. It is reprinted in full as Appendix II (App. pp. 9-13).

The opinion of the Referee in Bankruptcy was not reported. It is reprinted in full as Appendix III in this Statement. (App. pp. 14-16).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED.

The Nature of the Proceedings and the Statute Pursuant to Which It Is Brought.

This is an adversary proceeding within a Bankruptcy case wherein Edward Limperis, Trustee in Bankruptcy, is Plaintiff and the Village of Carpentersville is the sole Defendant in Count II, a complaint to restrain enforcement of the Village's subdivision and residence occupancy ordinance, concerning partially constructed residence properties in the Bankrupt's estate, even though the public improvements to serve such properties such as streets, sidewalks, sanitary sewer system, storm sewer system and water system, which serve such properties, had not been constructed and where no plan or intention to so construct them was presented. The sought injunction was directed at the Village's attempts to enforce its subdivision ordinances, its building code and its occupancy ordinances, all police power regulations designed to protect and advance the health, safety and welfare of its inhabitants.

Count I of the adversary complaint directed to Thomas Martineck and Catherine Martineck and others concerned liens and priorities thereof, did not involve the Village of Carpentersville and is not related to the issues and parties of Count II.

The Referee in Bankruptcy found that the "best interests of the estate" required the completion and sale of the residence properties,

> "free from any restraint or interference from the Village of Carpentersville, including refusals to issue occupancy permits, due to the failure of the Bankrupt, Trustee or other party to complete offsite improvements located within the River's End Subdivision"

and decreed and directed that the Village of Carpentersville permit the Trustee, his agents and purchasers to have occupancy and to issue permits therefor, even though its police-power ordinances requiring construction of streets, sewers, water system, sidewalks and surface water drainage had not been complied with.

The District Court reversed the Referee in Bankruptcy, holding that the Village was not attempting to prevent the Trustee from liquidating the estate, but was merely enforcing its ordinances requiring the completion of public improvement prior to occupancy of the residences involved.

The Trustee appealed to the Circuit Court for the Seventh Judicial Circuit, which overruled the District Court and reinstated and reaffirmed the order of the Referee in Bankruptcy.

The Date of The Judgment Sought To Be Reviewed, The Time of Its Entry, The Date The Notice Of Appeal Was Filed and The Court In Which It Was Filed.

The judgment was dated July 14, 1978, and was entered July 14, 1978.

The Notice of Appeal was filed on September 11, 1978, in the United States Court of Appeals for the Seventh Circuit, Chicago.

The Statutory Provisions Conferring on This Court Jurisdiction of This Appeal.

This appeal is taken pursuant to Section 47 (c) of the Bankruptcy Act (11 U.S.C., Sec. 47 (c)), which provides that the Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the United States Courts of Appeals in proceedings under this title, in accordance with the provisions of the laws of the United States, now in force or such as may hereafter be enacted, and to Section 1254 of the Judicial Code (28 U.S.C., Sec. 1254), which authorizes appeals to this Court by a party relying on a State statute (Village Ordinances) held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States.

CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS COURT.

Cases believed to sustain the jurisdiction of this court are:

Mitchell Store Bldg. Co. v. *Carroll,* Ohio, 1914, 34 S. Ct. 410, 232 U.S. 379, 58 L.Ed. 650.

Hebert v. *Crawford,* Texas, 1913, 33 S.Ct. 484, 228 U.S. 204, 54 L.Ed. 800.

Sherr v. *Sierra Trading Corporation,* 492 F.2d 971 (1974).

In Re Federal Photo Engraving Corp., C.C.A. N.Y., 1931, 54 F.2d 628, 19 Am. Bank. Rep. 15, 407.

Watson v. *Employers Liability Assur. Corp.,* La., 1954, 75 S. Ct. 166, 348 U.S. 66, 99 L.Ed. 635, *rehearing denied,* 75 S. Ct. 289, 348 U.S. 921, 99 L.Ed. 722.

United States Pipe Line Co. v. *Ideal Cement Co.,* Ala., 1962, 82 S. Ct. 676, 369 U.S. 134, 7 L.Ed.2d 623.

Doran v. *Salem Inn, Inc.,* U.S.N.Y. 1975, 95 S.Ct. 2561, 422 U.S. 922, 45 L.Ed.2d 648.

City of New Orleans v. *Dukes,* 1976, 96 S. Ct. 2513, 427 U.S. 297, 49 L.Ed.2d 511, on remand 537 F.2d 856.

The Village Ordinance Involved.

The Subdivision Ordinances of the Village of Carpentersville, requiring the construction of sanitary sewers, water system, street improvements, sidewalks, driveway openings, public utility lines for telephone and electric services, land-scaping and street lighting, as a prerequisite to the issuance of building permits and occupancy permits, being Sections 7, 10 and 11 of Chapter 9 of Municipal Code of the Village of Carpentersville, Illinois, entitled *Subdivisions,* are furnished in pertinent text as Appendix V in this Statement. (App. pp. 19-24).

THE QUESTIONS PRESENTED BY THIS APPEAL.

1. Whether the Referee in bankruptcy has the right and authority, under the bankruptcy laws of the United States, to order an municipality to permit the Trustee in bankruptcy to construct or complete residence buildings commenced by the bankrupt and to secure occupancy permits for such residence buildings, without the prerequisite construction and completion of off-site public improvements essential to healthful, safe, and sanitary occupancy of such buildings by human beings, contrary to the several police-power ordinances of such municipality.

2. Whether the Referee in bankruptcy has the right and authority, under the bankruptcy laws of the United States, to restrain the Village of Carpentersville from enforcing its police regulations and from interfering with the violation, by the Trustee in bankruptcy, of its police-power regulations regarding subdivisions and occupancy of residence buildings.

3. Whether a Trustee in bankruptcy is immune from lawful police-power regulations of a municipality and can their enforcement be restrained as to the bankrupt and his transferees simply because it is economically advantageous.

STATEMENT OF FACTS

This case is an adversary action in a bankruptcy proceeding wherein the Trustee for the Bankrupt, Phillips Construction Company, Inc., sought and secured an order to sell eleven residence lots and houses in the River's End subdivision of Carpentersville, and restrained the Village of Carpentersville from enforcing its police-power regulations requiring the construction of public improvements to serve such residences, such as streets, sidewalks, sewer, water and drainage, against the Trustee in Bankruptcy.

Prior to 1974, the Bankrupt was a developer of residential properties in the easterly portion of the River's End subdivision, consisting of 102 lots. The westerly portion of the subdivision had been developed by another builder more than ten years previous, who had installed the required facilities.

Phillips was selling its residences or partially completed residences to limited income people under the federal 235 program under which the United States government issued certain loan guarantees. Phillips followed the practice of partially completing the homes, selling them and permitting the purchasers to move in without occupancy permits, without constructing the public improvements required by the Village ordinances to-wit, streets, sidewalks, water sanitary sewage system and surface drainage system.

A continuing battle occurred in the local police courts during the years, 1970, 1971, 1972 and 1973 between the Village of Carpentersville and Phillips Construction Company, Inc., which resulted in repeated fines against Phillips

for giving possession of these partially completed houses without public improvements, and without occupancy permits, to families who were desperate for these publicly financed homes, securing 100% of its purchase money, while abstaining in the construction of the public improvements to serve them. The fines did not terminate the practice. Twenty lots and houses remained unsold at the time of Phillips' bankruptcy in 1974.

The Trustee sought and secured an order to abandon from the Referee in Bankruptcy (order of July 30, 1975) concerning nine of these lots, as being in a poor state of repair and without equity, leaving the eleven lots, which are the subject matter of this adversary action.

STATEMENT OF REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

The Circuit Court of Appeals, in reversing the District Court, has overridden the valid police-power ordinances of the Village of Carpentersville designed to protect and preserve the health, safety and welfare of its residents. It has substituted its judgment on these essentially legislative matters for that of the Village's corporate authorities, and has done so under grievous misapprehension of basic fact.

A monumental and absolutely untrue factual misrepresentation was foisted upon and accepted by the Circuit Court, viz, that the bankrupt had developed the entire subdivision and the Village had not enforced its subdivision and occupancy ordinances respecting the 190 residences already built.

In truth, about half of the 190 residences were built 15 years ago by a responsible developer, L. W. Besinger & Associates, the subdivision ordinance was complied with, the streets, water distribution system, sewer system, etc. were built and accepted prior to sale and occupancy of the residences. There was no waiver or immunity sought or granted on these.

Phillips entered the picture more than ten years later and bought the undeveloped lots in the lowland area, next to the Fox River, which Besinger had declined to build upon. Besinger sold these lots to Phillips, who built upon most of them. The final eleven of these lots are the subject matter of this adversary action.

Accordingly, the Circuit Court's determination that the Village has waived certain of its ordinance requirements "in 190 out of 200 instances" is completely untenable.

Part of this misunderstanding may stem from the fact that no evidentiary hearing was permitted by the Referee in Bankruptcy.

Of like nature is the untrue footnote on Page 2 of the opinion that building permits were issued, expired and that "the Village has refused to reissue them". In truth, neither the Bankrupt nor the Trustee ever applied for reissuance. If either had, such building permits would have been issued upon proper application after the public improvements were completed or in the course of construction and substantially completed. Occupancy permits, however, would not be issued until the public improvements to serve the completed residences had been completed.

Probably the most abrasive aspect of the judgment appealed from is the determination that the Village waived Section 11 of its subdivision ordinance in that the same was not specifically cited. Actually, all of the applicable police-power ordinances were stressed by the Village from the inception of this action. In Paragraph 8 of the initial response to the motion for injunction under Count II of the adversary complaint, the Village avers that it,

> "has required that its building, subdivision and occupancy ordinances be observed and that the streets, sewer system, water system, drainage system and other public improvements be made and installed in the due course of development."

and in the prayer thereof urges:

> "that said Motion of the Trustee in bankruptcy be denied and that he be required to observe all of the building code, subdivision ordinances and occupancy ordinances of the Village as a prerequisite to the sale and occupancy of the lots in question."

This adversary action for injunction was instituted by the Trustee; the Village was Defendant in Count II. The Trustee, not the Village, had the burden of proof. The Trustee was able to furnish no statutory or case authority, under the Bankruptcy law, which would sustain its position that the duty to liquidate the estate immunized the Trustee from local police-power regulations.

The position of the Village from the outset has been that the Trustee, his grantees and assigns are subject to these regulations, the same as all other owners and vendors of properties under construction, and that all of these regulations, including Section 11 of the subdivision ordinance, were enforceable and that to grant immunity, as the Referee did, and the Circuit Court affirmed and reinstated, is to deny equal protection under the United States Constitution. The Village did not waive Section 11 or any other provision of its subdivision and occupancy ordinances.

These or similar building, subdivision and occupancy ordinances are in effect in virtually every municipality in the United States.

The ultimate error was committed by the Circuit Court, in affirming the Bankruptcy Referee's injunction, without any reference to any legislative or judicial authority under the Bankruptcy laws, and upon a theory not pleaded by the Plaintiff Trustee, a novel and dangerous theory with calamitous potential to the Bankruptcy laws—that the duty to liquidate the estate of a bankrupt warrants the destruction of everything and everyone in its path.

The very heart and survival of municipal corporations hinge upon their ability to enforce municipal regulations authorized and adopted under the power of police. Vital among these are regulations to promote and protect the health, safety and welfare of their inhabitants in the residential areas—the drainage and treatment of sewerage to avoid illness and pestilence, the furnishing of pure water suitable for human consumption, the drainage of surface water to prevent flooding, stagnation and contamination, the construction of streets to provide access for police personnel, fire fighting equipment and other emergency vehicles, as well as ordinary use by the residents, the construction of sidewalks to provide safe and dry walkways for children and others.

These basically essential public improvements required by the Village's subdivision ordinance are the precise ones which the bankrupt had failed to provide in that portion of the River's End subdivision, which it developed, and are the precise regulations which the Trustee sought by this adversary action in injunction to prevent the Village from enforcing, as a prerequisite to occupancy of the residences, all for the claimed reason that under the Bankruptcy Act he had a duty to liquidate the estate and that, if immunized from these requirements, he could so liquidate the estate more advantageously.

This myopic view and unsound theory is neither authorized by the Bankruptcy Act nor protected by the Supremacy Clause of the Constitution and is highly prejudicial to responsible and law abiding developers, who install these public improvements as an integral part and cost of development.

Certainly, it was never the intention of the Congress, in enacting the Bankruptcy laws, to create a vehicle to overrun the police-power regulations of municipalities and other local governments.

If this decree is sustained, it will be a harbinger of like situations, will encourage planned bankruptcies, will precipitate an avalanche of intended slum creations, will spread beyond the field of real estate development and will eventuate in massive, far-reaching, irreconcilable and intolerable conflicts between federal law and local laws, between bankruptcy courts and municipalities.

CONCLUSION

For the reasons set forth in this Jurisdictional Statement, the federal questions presented by this appeal are substantial and of such moment as to merit this Court's consideration.

Accordingly, the Village of Carpentersville urges plenary consideration of this appeal and reversal of the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RICHARD W. HUSTED
Attorney for Appellant.

APPENDIX

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1879

IN THE MATTER OF
PHILLIPS CONSTRUCTION COMPANY, INC.,
Bankrupt,

EDWARD LIMPERIS, Trustee,
Plaintiff-Appellant,

v.

THOMAS MARTINECK and CATHERINE MARTINECK, et al.,
including VILLAGE OF CARPENTERSVILLE,
a municipal corporation,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 74-B-3481

ALFRED Y. KIRKLAND, *Judge.*

ARGUED JANUARY 17, 1977 — DECIDED JULY 14, 1978.

Before FAIRCHILD, *Chief Judge,* CASTLE, *Senior Circuit Judge, and* CUMMINGS, *Circuit Judge.*

FAIRCHILD, *Chief Judge.* Appellant Edward Limperis (hereinafter referred to as "the Trustee"), as trustee in bankruptcy of Phillips Construction Company, Inc. (hereinafter "the Bankrupt"), from a judgment of the district court which reversed an order of the Bankruptcy Court directing the Village of Carpentersville (hereinafter "the Village") to permit the construction and occupancy of homes upon eleven residential lots which are assets of the bankrupt estate.

The Bankrupt was in the business of real esate development and construction. As one of its undertakings, the Bankrupt developed the Rivers End Subdivision in Carpentersville, Illinois. The subdivision contains approximately 200 homesites. Prior to bankruptcy, homes had been completed and occupied on approximately 199 of the homesites. In order to record the final plot under the Village ordinance, the Bankrupt proposed plans for and agreed to install extensive public improvements in the subdivision including streets, sidewalks, driveways, and storm and sanitary sewers for use by all the homes in the subdivision. Many of these improvements remain uncompleted.[1]

The Trustee, pursuant to his desire to liquidate the Bankrupt's estate, has attempted to sell the eleven lots which are presently unoccupied.[2] Because of the unfinished

[1] Since this case is presently still at the pleading stage, there is no evidentiary record to determine the extent to which improvements remain uncompleted.

[2] The eleven lots owned by the Trustee are scattered in the eastern portion of the subdivision. The lots have apparently been neglected and victimized by vandals and therefore any improvements which had been made on the lots have deteriorated.

state of the public improvements in the subdivision, however, the Village refused to issue building or occupancy permits which are necessary for construction or occupancy of any homes on the eleven lots.[3] As a result of this action by the Village, the eleven lots have become unmarketable and therefore the Trustee has been unable to sell the lots to any prospective purchasers.

The Village contends that its actions were authorized by its ordinance governing subdivisions and constituted a reasonable exercise of its police power to protect the health and welfare of its citizens. The Village further asserts that it can withhold permits from the Trustee because the Trustee has no greater rights than those of the Bankrupt or any other owner of lots.

The Trustee, on the other hand, contends that the actions of the Village were not authorized by the Village ordinance. The Trustee also argues that the actions of the Village frustrated his right to liquidate the Bankrupt's estate guaranteed under the Bankruptcy Act and are therefore invalid under the Supremacy Clause, U.S. Const., Art. 6, Clause 2. Finally, the Trustee asserts that the refusal of the Village to issue permits conflicts with section 70(b) of the Bankruptcy Act, 11 U.S.C. § 110(b), which gives the Trustee the power to reject executory contracts.

After hearing oral argument, the Bankruptcy Court entered an order directing the Village to permit the Trustee and his purchasers to enter upon the eleven lots, complete construction of residences, and thereafter permit occupancy

[3] Permits have been issued on the 190 other lots which are presently occupied. Permits also were issued on the eleven lots presently owned by the Trustee but these have expired and the Village has refused to reissue them.

of said residences. The district court then reversed the Bankruptcy Court and held in favor of the Village.

Because we agree with the Trustee that the withholding of permits was not authorized by the Village ordinance, we reverse the judgment of the district court.

I. THE VALIDITY OF THE WITHHOLDING OF PERMITS UNDER THE VILLAGE ORDINANCE.

The Village argues that it had the right to withhold permits under its police power to protect the health and welfare of its citizens as embodied in its ordinance governing subdivisions. The position of the Village is simply that it should not be compelled to accept eleven additional homes under the unsafe and undesirable conditions caused by the absence of required public improvements. Under this theory, the Trustee is in no different position than any other owner of lots within the subdivision.[4] To evaluate this claim by the Village, it is necessary to examine in some detail the provisions of the Village ordinance.[5]

Construction within the Village is governed by several sections of the Village ordinance. Section 2(a) of the ordinance prohibits the subdivision of land, the making of improvements to the land, and the laying of streets until a proposed plan has been approved by action of the Board of Trustees of the Village. Section 2(b) prohibits the sale or offer of sale of any lot, tract or parcel of land within

[4] The Village stated at oral argument that it would refuse to issue any permits to any owner of land under present conditions.

[5] The legislative grant of municipal police powers is embodied in *Ill. Rev. Stat.* Ch. 24, Sec. 11-1-1. The only way in which this delegated power may be exercised is by the establishment of an ordinance. *E.g., Village of Altamont* v. *Baltimore and O.S.W. Ry. Co.*, 184 Ill. 47, 56 N.E. 340 (1900).

any subdivision until such subdivision plans are officially approved by the Board of Trustees of the Village. Section 2(c) provides that no improvements such as sidewalks or drainage facilities shall be made until the plans for such improvements have been formally recommended by the Plan Commission and approved by the Board of Trustees.

Section 6 of the ordinance sets forth items which must accompany the recordation of the final plat of the subdivision. Subparagraph (a) of section 6 requires plans and specifications for public improvements previously approved by the Village engineer. Subparagraph (b) requires an agreement executed by the owner and subdivider to make, install and turn over to the Village the improvements provided for in ordinance. Subparagraph (c) requires a bond in the amount of the estimate of the Village engineer of the cost of the installation of the improvements "with good and sufficient surety thereon," to be approved by the Board of Trustees, conditioned upon installation within two years of approval.

Section 7 of the ordinance lists the required land improvements which must be made. The section also provides that final plans of the subdivision must be accompanied by a written statement signed by the Village engineer certifying that the improvements described in the plans and specifications meet the minimum required by the ordinance.

The ordinance provides for several remedies in the event required public improvements are not completed. As stated above, subparagraph (c) of section 6 mandates that a developer put up a bond guaranteed by a surety in the amount of the estimate of the cost of all public improvements. In the present case, the Village for some inexplicable reason only required a bond of $20,000. While this

bond is currently the subject of litigation in state courts, the amount of the bond is far less than the estimated cost of completing the unfurnished improvements. Subparagraph (b) of section 6 which requires a subdivider to enter into an agreement to build and install the improvements described in section 7 also appears to create a remedy for breach of contract against the developer in the event of nonperformance.[6] Additional protection against nonperformance is provided by section 8 which provides for inspection of public improvements by the Village engineer at the subdivider's expense. Finally, section 16(a) of the ordinance provides that the construction of any public improvement in violation of the provisions of the ordinance shall be fined between $25 and $250 with each day during which a violation occurs or continues constituting a separate offense.[7] Here, however, the Village had attempted to rely on the absence of required public improvements as a justification for the withholding of building and occupancy permits from the Trustee and any prospective purchasers. From the viewpoint of the Village, the Trustee is no more entitled to permits under the ordinance than the owner of any lot where required improvements have not been completed. The question is whether the withholding of permits is permissible under the ordinance.

Section 11 of the ordinance states that no occupancy permits shall be issued until required utility facilities have been installed and roadways providing access to the lots in question have been constructed or are in the course of

[6] The Village stated at oral argument, however, that no agreement was ever entered into in this case.

[7] The record is silent on whether the Village ever attempted to rely on section 16(a).

construction. The Trustee has stipulated in its brief and at oral argument, however, that such improvements as sidewalks and driveways will be installed. The Trustee has not conceded that other improvements such as sewer connections or roadway access will be provided by purchasers. Since the Village never specifically cites section 11 as a ground for withholding permits, however, it has waived any claim of lack of utility facilities or road access.

Section 10 of the ordinance governs the issuance of building permits. Section 10 provides:

> No building permit shall be issued by any governing officials for the construction of any building, structure or improvement to the land or any lot within a subdivision as defined herein, which has been approved for platting or replatting, until all requirements of this Ordinance have been fully complied with.

Thus in contrast with section 11 which contains fairly specific language regulating the issuance of occupancy permits, section 10 contains broad general language, the interpretation of which is in dispute.

The Village contends that since public improvements remain uncompleted, all requirements of the ordinance have not been fully complied with and therefore it need not issue any building permits, to the Trustee or anybody else. The Trustee, on the other hand, argues that the Bankrupt fully complied with the steps set out in sections 6 and 7 of the ordinance which are necessary for recordation of the final plat. Failure to complete public improvements, according to the Trustee, does not constitute failure to comply with the ordinance, but failure to fulfill the agreement, section 6(b), and comply with the conditions of the bond which, under section 6(c), is designed to equal the cost of the required public improvements. Any failure to perform could be cured by recovering from the surety and applying the

proceeds to the cost of completing the unfinished improvements. A claim could also be filed in the bankruptcy proceedings. Under the Trustee's interpretation of the ordinance, therefore, all requirements of the ordinance, in contrast with the conditions of the bond, have been fully complied with and the Village has no right to withhold building permits.

It is conceivable, as the Village claims, that the phrase "requirements of this Ordinance" in section 11 includes fulfillment of the section 6(b) agreement. But we agree with the Trustee's interpretation of the ordinance for several reasons. First, the Village construed the phrase in 190 out of 200 instances as not including fulfillment of section 6(b). Second, sale is permitted immediately after recording and it seems unlikely that building and occupancy were intended to be delayed until all improvements were completed. The bond, under section 6(c), permits a two-year delay after approval before improvements need be completed. Third, an occupancy permit is permitted before completion of an access road. In light of these provisions of the ordinance and past practice of the Village, we cannot agree with the Village that there can be no construction or occupancy until all improvements are completed.

Since the Village had no authority under the ordinance to withhold permits, we need not consider whether the actions of the Village conflict with any powers granted to the Trustee by the Bankruptcy Act and are therefore invalid under the Supremacy Clause.

The judgment appealed from is reversed with directions to reinstate and affirm the order of the Bankruptcy Court.

APPENDIX II

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 B 3481

In The Matter Of
Phillips Construction Company, Inc.,
Bankrupt,

Edward Limperis, Trustee,
Plaintiff-Appellee,

v.

Thomas Martineck and Catherine Martineck, et al.,
including Village of Carpentersville,
a municipal corporation,
Defendants-Appellants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on defendants' appeal from the December 10, 1975 Order of the Bankruptcy Court. Pursuant to Rule 754 of the Rules of Bankruptcy Procedure, the Bankruptcy Judge dismissed defendants' appeal from an earlier order entered November 4, 1975. In the earlier order, the Bankruptcy Court directed defendant Village of Carpentersville (the "Village") to allow plaintiff either to compete construction on the property without completion of the required off-site improvements or to sell the homes unencumbered by building code requirements.

Defendants argue that the earlier appeal to the Bankruptcy Court was improperly dismissed under Rule 754. Defendants urge this Court to set aside the November 4, 1975 Order because under federal bankruptcy law the Bankruptcy Judge did not have the power to restrain defendant Village from a valid exercise of its police power. Plaintiff responds that the Bankruptcy Court correctly dismissed the defendants' appeal under Rule 754 because the order was interlocutory in nature. Plaintiff also argues that since the Bankruptcy Rules conflict with defendant Village's exercise of its police power, the federal law will supersede the local municipal code.

STATEMENT OF FACTS

Plaintiff and defendants are in substantial agreement on the relevant facts. Phillips Construction Company, Inc. ("Phillips") ceased operations in 1973, leaving unfinished eleven homes and numerous off-site improvements in a subdivision of the Village of Carpentersville. Phillips was adjudged bankrupt in 1974 and plaintiff was appointed Trustee in 1975. Plaintiff then filed suit to liquidate the estate by selling the property free and clear of liens and encumbrances. Defendant Village opposed such a sale because the requirement of construction of off-site improvements would not be met under such an arrangement. Instead defendant Village demanded that either plaintiff or any purchaser of some or all of the homes complete all off-site improvements before finishing and selling the homes. In the November 4, 1975 Order the Bankruptcy Court ordered defendant Village to waive these requirements so that plaintiff could liquidate the estate.

PLAINTIFF'S CHALLENGE OF DEFENDANT'S RIGHT TO APPEAL

Under Rule 801, Rules of Bankruptcy Procedure, an order of a bankruptcy court must contain some elements of finality and be determinative of an issue in order to be appealable before termination of the action. As noted in 13 *Collier on Bankruptcy* Paragraph 801.06, at 8-8 (1976):

> (M)any, if not most, interlocutory orders of the referee should be considered non-trivial, and therefore reviewable. Examples are temporary restraining orders, injunctions, orders punishing or certifying contempt . . . and many other orders which, though not finally dispositive of all issues between the parties, are nevertheless of sufficient impact as to permit, even require, supervisory review by the district judge.

The November 4, 1975 Order compelling defendant Village to allow completion and/or sale of the unfinished homes without construction of the required off-site improvements is final as to defendant Village. If plaintiff is allowed to proceed in accordance with the Order, defendant Village will have persons occupying homes that fail to meet the municipal building code requirements.

Accordingly, this Court finds that defendants' present appeal is proper.

PLAINTIFF'S CHALLENGE OF THE NOVEMBER 4, 1975 ORDER

Plaintiff cites a number of cases in support of his allegation that defendant Village's exercise of its police power conflicts with operation of federal bankruptcy laws. However, this Court believes that these cases can be clearly distinguished since each involves a legislative enactment that would frustrate completely operation of the bank-

ruptcy laws. In the present case, defendant Village is not attempting to prevent plaintiff from liquidating the property under Section 70 of the Bankruptcy Act (the "Act"), 11 U.S.C. §110. Rather, defendant Village is seeking to insure that liquidation does not take place without prior compliance with the municipal building code.

Plaintiff attempts to characterize the obligation of the bankrupt to complete all off-site improvements as an executory contract between the bankrupt and defendant Village. However, defendants point out that there was no contractual obligation as such between the parties. Defendant Village merely followed its usual procedure in dealing with a building contractor. The contractor would apply for the necessary permits which would issue only after substantial compliance had been achieved. The bankrupt never completed the necessary off-site improvements and no occupancy permits were ever issued for the homes in question.

> The trustee (in bankruptcy, plaintiff in this action) succeeds only to such rights as the bankrupt possessed; and the trustee is subject to all claims and defenses which might have been asserted against the bankrupt but for the filing of the (bankruptcy) petition. *Bank of Marvin* v. *England,* 385 U.S. 99, 101 (1966).

This Court believes that regulations imposed on building contractors are a valid exercise of the police power under Illinois Revised Statutes ch. 24 §§11-1 *et seq.* The regulations appear reasonably related to the promotion of the health and welfare of the citizens of the Village. *People* v. *Warren,* 11 Ill. 2d 420, 143 N.E.2d 28 (1957). Defendant Village is not attempting to prevent plaintiff from liquidating the estate, but is merely attempting to insure that completion of all required off-site improvements will precede the completion and sale of the homes involved.

This Court therefore finds no conflict between the provisions of the Bankruptcy Act and defendant Village's exercise of its police power.

CONCLUSION

Accordingly, the Order of the Bankruptcy Court entered on December 10, 1975 is reversed. The Order entered on November 4, 1975 is reversed and remanded for further proceedings in accordance with this opinion.

Enter: .....
ALFRED Y. KIRKLAND, JUDGE

DATED: June 30, 1976

APPENDIX III

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 B 3481

IN THE MATTER OF
PHILLIPS CONSTRUCTION COMPANY, INC.,

Bankrupt,

EDWARD LIMPERIS, Trustee,

Plaintiff,

v.

THOMAS MARTINECK and CATHERINE MARTINECK, et al.,

Defendants.

ORDER

At Chicago, Illinois, in said Division and District aforesaid, before the Honorable Robert Eisen, Bankruptcy Judge, this 31st day of October, A.D., 1975:

This cause coming on to be heard on the motion of the plaintiff in this adversary action, EDWARD LIMPERIS as Trustee of the Bankrupt herein, for the entry of an order pursuant to Count II of his complaint directing the Village of Carpentersville to permit the sale, completion

of construction and occupancy of homes in which the Trustee has an interest; the Court having considered the motion of the plaintiff, the suggestions of the Village of Carpentersville in opposition to said motion, and the arguments in open Court of counsel for the plaintiff, the Village of Carpentersville and the Percy Wilson Mortgage & Finance Corporation as mortgagee of said property, finds as follows:

A. That the Court has jurisdiction over the parties and subject matter hereto, and that due notice has been given;

B. That the Trustee is vested by operation of law with the Bankrupt's title to or an interest in the property located in the Village of Carpentersville and more particularly described as:

> Lot 3 of Block 3, Lot 3 of Block 4, Lot 4 of Block 5, Lots 3 and 4 of Block 7, Lots 3, 6, 37 and 41 of Block 8, Lots 53 and 54 of Block 9 in River's End Unit One, being a Subdivision of part of Sections 10, 15 and 16, Township 42 North, Range 8, East of the Third Principal Meridian, in Kane County, Illinois;

C. That the above-described property is improved with single-family residences, with the exception of Lot 6 of Block 8 which residence was destroyed by fire, which residences remain in various stages of partial completion;

D. That the Village of Carpentersville has revoked the building permits on the aforesaid residences and prohibited further work thereon until certain off-site improvements, being sidewalks, driveways, parkways, storm sewers, sanitary sewers, components of the water system and street paving, which are not located on said properties but constitute part of the public improvements of the subdivision, were completed or repaired;

E. That the refusal of the Village of Carpentersville to permit the sale, completion of construction or the ulti mate occupation upon sale by the Trustee of the residences upon the above-described property due to the Village's insistence that the Trustee undertake to complete the Bankrupt's alleged obligation to construct and repair the aforesaid public improvements constitutes an unreasonable and arbitrary exercise of its powers;

F. That the best interests of the estate require that the Trustee be authorized to sell and/or complete construction of the aforesaid property, free from any restraint or interference from the Village of Carpentersville, including refusals to issue building or occupancy permits due to the failure of the Bankrupt, Trustee or other party to complete off-site improvements located within the River's End Subdivision, of the Village of Carpentersville.

G. That the best interests of the estate require that the property located in the Village of Carpentersville be sold or completed prior to the approaching winter, which threatens further and imminent deterioration or destruction of said residences, and in order to maximize the value to be realized to the estate upon their sale, wherefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Village of Carpentersville, its officers, trustees, agents and attorneys be and the same are hereby directed to permit and allow the Trustee herein, his agents and purchasers, to enter upon the property heretofore described, to complete construction thereof, to permit occupancy of said properties and to issue all necessary permits to said Trustee, his agents and purchasers, for construction, building and occupancy of said properties.

ENTER:

.....

BANKRUPTCY JUDGE

APPENDIX IV

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois

No. 76-1879

In The Matter Of
Phillips Construction Company, Inc.,
Bankrupt.

Edward Limperis, Trustee,
Plaintiff-Appellant,

v.

Thomas Martineck and Catherine Martineck, et al.,
including Village of Carpentersville,
a municipal corporation,
Defendants-Appellees.

Appeal From the United States Court of Appeals,
Seventh Circuit, to the Supreme Court of
the United States

NOTICE OF APPEAL

To: Edward Limperis, Trustee in Bankruptcy, for Phillips Construction Company, Inc., Bankrupt, Plaintiff-Appellant

and

Richard W. Burke, Jeffrey D. Warren 3100 Prudential Plaza, Chicago, Illinois 60601

OF COUNSEL:
Hubachek, Kelly, Rauch
& Kirby

YOU ARE HEREBY NOTIFIED that Defendant-Appellee, VILLAGE OF CARPENTERSVILLE, a municipal corporation, in the above entitled proceeding, hereby appeals to the Supreme Court of the United States from that certain final judgment and order entered on the 14th day of July, 1978, by the United States Court of Appeals for the Seventh Circuit, wherein that Court reversed the judgment and order of the United States District Court and directed that Court to reinstate and affirm the order of the Bankruptcy Court, with costs, in accordance with written opinion of the United States Court of Appeals for the Seventh Circuit, filed July 14, 1978.

Defendant-Appellee (Appellant in the Supreme Court), said VILLAGE OF CARPENTERSVILLE, prays that said order of the United States Court of Appeals for the Seventh Circuit, entered on July 14, 1978, be reversed and the order of the United States District Court entered June 30, 1976, reversing the Bankruptcy Court, be reinstated and affirmed.

Given this 8th day of September, 1978.

Village of Carpentersville, a
municipal corporation, Defendant-
Appellee
By .....
Richard W. Husted, Attorney for
Defendant-Appellee

RICHARD W. HUSTED
35 Fountain Square Plaza
Elgin, Ill. 60120
(312) 742-8191

CERTIFICATE OF SERVICE

Richard W. Husted, counsel herein for Defendant, VILLAGE OF CARPENTERSVILLE, hereby certifies that he served true copy of the foregoing Notice of Appeal via U.S. Mail, deposited in the U.S. Post Office at Elgin, Illinois, on the 11th day of September, 1978, addressed to each of the following:

Richard W. Burke
3100 Prudential Plaza
Chicago, Illinois 60601

Jeffrey D. Warren
3100 Prudential Plaza
Chicago, Illinois 60601

Hubachek, Kelly, Rauch & Kirby
3100 Prudential Plaza
Chicago, Illinois 60601

all counsel for EDWARD LIMPERIS, Trustee in Bankruptcy for Phillips Construction Company, Inc., Bankrupt, Plaintiff-Appellant.

Made and given this 11th day of September, 1978.

.....
Richard W. Husted, Attorney for
Defendant-Appellee

RICHARD W. HUSTED
35 Fountain Square Plaza
Elgin, Ill. 60120
(312) 742-8191

(Original of Notice of Appeal and Certificate of Service thereof filed in Office of the Clerk of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois on the 11th day of September, 1978.)

APPENDIX V

SECTIONS 9-7, 9-10 and 9-11 OF CHAPTER 9 OF THE MUNICIPAL CODE OF THE VILLAGE OF CARPENTERSVILLE, ILLINOIS, ENTITLED *SUBDIVISIONS*, PROVIDES:

Sec. 9-7 *Required Land Improvements.* No subdivision of land shall be approved without receiving a statement signed by the Village Engineer with agreements, meet the minimum requirements of all ordinances of the Village and that they comply with the following:

(a) Sewers.

1. Sanitary sewers shall be installed to comply with specifications established by the Village Engineer and the State of Illinois Sanitary Water Board and shall be connected to the sanitary disposal system of the Village of Carpentersville if reasonably accessible, otherwise, to a specially constructed sanitary sewage disposal plant in accordance with plans acceptable to the Village. House stubs for sanitary sewer connections shall be installed for each lot and shall be extended from the main to within one foot of the street right-of-way. A subdivision plat shall in no case be approved which shall be dependent upon individual septic tanks with private wells, except where lots therein contain not less than twenty thousand square feet each. If the subdivision is served with public water, the lots with septic tanks shall contain a minimum of ten thousand square feet, providing the ground percolation is acceptable to the Village Engineer.

2. When required by the Village Engineer, storm sewers shall be constructed throughout the entire subdivision.

(b) Water System.

The water supply system shall be installed in accordance with the specifications of the Village Engineer. House service connections shall be installed for each lot and shall be extended from the main to within one foot of the right-of-way of the property to be served, whenever practicable.

(c) Street Improvements.

1. Grades of streets shall not be in excess of five percent on primary or secondary streets, nor in excess of six percent on other streets.

2. All streets within the corporate limits of the Village of Carpentersville shall be improved with roadways, bounded by integral concrete curbs and gutters, to an overall width in accordance with the following dimensions:

Type of Street	Dedicated Street Width	Roadway Width
Primary or major streets in no instance less than 80 feet	Conform to major street plan and	40 feet
Secondary street	66 feet	36 feet
Minor Streets	60 feet	27 feet
Cul-de-sac	50 feet	27 feet

3. (a) Residential streets shall have a mimimum structural number of 2.60 A, according to the State of Illinois, Department of Public Works and Buildings, Bureau of Design, Design Manual.

(b) Industrial streets shall be designed and have minimum standards according to the type of traffic involved, anticipated volume weight, to be approved by the Village Engineer.

4. Concrete curbs and gutters shall be installed and in accordance with the requirements of the Village of Carpentersville.

5. Storm water inlets shall be provided within the roadway improvement at points specified by the Village Engineer.

6. All curb corners shall have a radii of not less than fifteen feet and at important intersections, not less than twenty-five feet.

7. In subdivisions outside the corporate area, but within the one and one-half mile area, roadway improvements shall conform to the same standards of improvements as required of subdivisions within the corporate area. The curb and gutter may be omitted when recommended by the Plan Commission and approved by the Village Board of the Village of Carpentersville, and the County Board of Commissioners of Kane County.

(d) Public Utilities

1. All utility distribution lines for telephone and electric service to be installed shall be placed underground within easements or dedicated public ways. The installation of such facilities shall be made in compliance with applicable orders, rules and regulations of the Illinois Commerce Commission now or hereafter affective, and the owner or subdivider of any property to be served from such underground installations shall be responsible for compliance with the rules and regulations, now and hereafter filed with said commission pursuant to the Illinois Public Utilities Act, of any public utility whose services shall be required with respect to the provisions of such underground facilities.

(e) Sidewalks.

1. Concrete sidewalks to a width of not less than four feet shall be located so that the extreme edges are within one foot of the outer boundaries of the street right-of-way.

(f) Landscaping.

1. All parkways within the dedicated street area or other public use area shall be graded in an approved manner.

2. A minimum of two street trees per lot having a trunk or diameter of not less than one and one-half inches shall be placed along all streets where trees do not exist, and placed in such a manner as to provide an effective appearance for the enhancement of abutting properties.

(g) Street Lighting.

1. Provisions shall be made for the adequate lighting of public streets within the proposed subdivision in accordance with the standards and requirements established by the governing authorities.

(h) Driveway Openings.

1. A driveway opening in the street curb shall be provided for each lot and a driveway shall be established for automobiles across the parkway, viz., from the paved portion of the street to the lot line, such driveway opening at the curbing to be of a width of not less than 12 feet, and narrowing to no less than 10 feet at the lot line; and such driveway shall be surfaced with cement or bituminous concrete, over a base of crushed stone or gravel.

Sec. 9-10. *Building Permits.* No building permits shall be issued by any governing officials for the construction of any building structure or improvement to the land or any lot within a subdivision as defined herein which has been approved for platting or replatting until all requirements of this Ordinance have been fully complied with.

Section 9-11. *Occupancy Permits.* No occupancy permit shall be granted by any governing official for the use of any structure within a subdivision approved for platting or re-platting until required utility facilities shall have been installed and made ready to service the property, and that roadways providing access to the subject lot or lots have been constructed, or that are in the course of construction.

No occupancy permit shall be granted by any governing body or official for the use of any structure within a subdivision which has an attached or separate garage, the floor surface of which is at a lower elevation than 6 inches above the curbing crest in the abutting street, or the middle of such abutting street, whichever is higher.

Supreme Court, U.S.
FILED
DEC 6 1978
MICHAEL RODAK, JR., CLERK

No. 78-621

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1978

VILLAGE OF CARPENTERSVILLE, a Municipal Corporation,

Appellant,

vs.

EDWARD LIMPERIS, Trustee,

Appellee.

Appeal from the United States Court of Appeals
for the Seventh Circuit.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT SOUGHT TO BE REVIEWED

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1978

VILLAGE OF CARPENTERSVILLE, a Municipal Corporation,

Appellant,

vs.

EDWARD LIMPERIS, Trustee,

Appellee.

Appeal from the United States Court of Appeals for the Seventh Circuit.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT SOUGHT TO BE REVIEWED

Edward Limperis, Trustee in bankruptcy of Phillips Construction Company, Inc., Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the appeal because it is not within the jurisdiction of this Court, or, in the alternative, to affirm the judgment of the United States Court of Appeals for the

Seventh Circuit sought to be reviewed because it is manifest that the question on which the decision of the case depends is so unsubstantial that further argument is not warranted.

Appellee respectfully submits the following discussion in support of this motion.

PREFACE

The dispute in this case consists of Appellant's refusal to issue building and occupancy permits for the eleven lots owned by Appellee (of which ten of the lots are improved with partially completed single family residences). The lots are interspersed in the eastern half of a subdivision consisting of approximately 200 homesites, 190 of which are completed and occupied by families. Appellant's refusal to issue building or occupancy permits on Appellee's lots is based solely upon Appellant's insistence that Appellee or his purchasers satisfy all of Appellant's demands in regard to completion of public improvements within the subdivision. Appellant demands:

a. That sidewalks be installed on 40 lots of which only 8 are owned by Appellee. (Appellee has at all times stipulated that sidewalks will be installed on his lots).

b. That driveways be installed upon 18 lots of which only 6 are owned by Appellee. (Appellee has at all times stipulated that driveways will be installed on his lots).

c. That parkways be graded upon 68 lots of which only 8 are owned by Appellee. (Appellee has at all times stipulated that parkways on his lots will be graded).

d. That 7 storm sewers be installed or repaired which service all of the 200 homes in the subdivision, not just the 11 lots owned by Appellee.

e. That 5 sanitary sewers be installed or repaired, to service all of the homes in the area of each sewer. Not a single one of the sewers demanded by Appellant is located on a lot owned by Appellee.

f. That 5 water system hydrants and valve boxes be raised or lowered and cleaned. Although the entire water system is installed and has been in use for years, the Appellant demands that Appellee or his purchasers make certain modifications to the hydrants and boxes although not a single one of the hydrants or boxes is located on the Appellee's lots and the hydrants and boxes would provide service to all homes in the vicinity.

g. That already existing public roads be repaved in front of 45 lots of which only 6 lots are owned by Appellee. The roads to be repaved are used by the entire community.

In addition to the foregoing facts, Appellee adopts the statement of the case and the statement of facts set forth in the judgment of the United States Court of Appeals for the Seventh Circuit which is sought to be reviewed. (Jur. St. Appendix I, pp. App. 2 - App. 4). Appellee objects to the Statement of Facts presented by Appellant (Jur. St., pp. 7-8) because it contains numerous assertions which are either inaccurate, unsupported by the record, or irrelevant to the issue in this case.

THE APPEAL SHOULD BE DISMISSED SINCE IT IS NOT WITHIN THE JURISDICTION OF THIS COURT, BECAUSE NOT TAKEN IN CONFORMITY TO STATUTE.

None of the questions which Appellant contends are presented for review (Jur. St., p. 6) are pertinent to the judgment sought to be reviewed. Contrary to Appellant's characterizations of the questions presented by the appeal, the judgment of the Court of Appeals did not involve an interpretation of any "right and authority" of referees in bankruptcy nor did it involve a holding that trustees in bankruptcy were "immune from lawful police-power regulations of a municipality." (Jur. St., p. 6). The only question decided by the Court of Appeals in this case was whether the action of the Appellant in withholding building permits on properties owned by Appellee was authorized by Appellant's ordinance. The Court stated that it was ruling in Appellee's favor simply "[b]ecause we agree with the Trustee that the withholding of permits was not authorized by the Village ordinance . . ." (Jur. St., p. App. 4). In fact, the Court of Appeals specifically *disclaimed* that its decision was in any way based upon federal statutory or constitutional considerations:

> "Since the Village had no authority under the ordinance to withhold permits, we need not consider whether the actions of the Village conflict with any powers granted to the Trustee by the Bankruptcy Act and are therefore invalid under the Supremacy Clause." (Jur. St., p. App. 8).

As Appellant points out, the jurisdiction of this Court to review the judgment of the Court of Appeals depends upon the provisions of 11 U.S.C. § 47(c) and 28 U.S.C. § 1254. (Jur. St., p. 4). 11 U.S.C. § 47(c) vests this Court with jurisdiction to review judgments of courts of appeals in bankruptcy proceedings "in accordance with

the provisions of the laws of the United States now in force or such as may hereafter be enacted." Since this case arises in proceedings under the Bankruptcy Act, the only question remaining is whether the judgment of the Court of Appeals in this case is one which may be reviewed on appeal in accordance with the provisions of 28 U.S.C. § 1254, which governs appeals to this Court from judgments of courts of appeals. In pertinent part, the statute provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> * * *
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"

According to the foregoing statute, an appeal from a judgment of a court of appeals is within this Court's jurisdiction only when the judgment involves the invalidation of a State statute (which has been construed to include a municipal ordinance: *City of New Orleans v. Dukes*, 472 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976)). Nowhere in the opinion of the Court of Appeals is it even suggested that the subdivision ordinance relied upon by the Appellant in this case was invalid. To the contrary, the Court of Appeals *enforced* the ordinance by holding that the Appellant's conduct which conflicted with the ordinance was improper. Therefore, it is clear that the appeal is not within the jurisdiction of this Court because it is not taken in conformity to the provisions of 28 U.S.C. § 1254(2), which is the applicable statute.

Finally, none of the cases cited by the Appellant "to sustain the jurisdiction of this court" (Jur. St., p. 5) support the appeal. When *Mitchell Store Building Company v. Carroll*, 232 U.S. 379, 34 S.Ct. 410, 58 L.Ed. 650 (1914) and *Hebert v. Crawford*, 228 U.S. 204, 33 S.Ct. 484, 57 L.Ed. 800 (1913) were decided, Section 24(c) of the Bankruptcy Act (now known as 11 U.S.C. § 47(c)) provided that judgments of courts of appeals in bankruptcy cases were to be reviewed by this Court by the method of appeal, without reference to other laws. However, the portion of that statute "as regulates the mode of review by the Supreme Court in the proceedings, controversies and cases therein named" was repealed by the Congress in 1925. (Act February 13, 1925, c. 229, § 13, 43 Stat. 936). Therefore, an appeal today certainly draws no support from those two cases.

Three of the cases upon which Appellant relies (Jur. St., p. 5) were appeals to this Court by parties relying upon State statutes or municipal ordinances which had been expressly invalidated by the courts of appeals below: *Watson v. Employer's Liability Assurance Corporation, Ltd.*, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1954) [Louisiana insurance statute had been held repugnant to the Equal Protection, Contract, Due Process and Full Faith and Credit Clauses of the U. S. Constitution by the Court of Appeals]; *United Gas Pipe Line Company v. Ideal Cement Company*, 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed.2d 623 (1962) [license code of City of Mobile, Alabama held repugnant to the Commerce Clause of the U. S. Constitution by the Court of Appeals]; *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) ["grandfather clause" in ordinance of City of New Orleans held repugnant to the Equal Protection Clause of the U. S. Constitution by the Court of Appeals]. All three of the cases were squarely within

the provisions of 28 U.S.C. § 1254(2), and accordingly this Court held that the appeals were within its jurisdiction under the statute. Those cases lend no support to Appellant's claim of jurisdiction, since this case is not within 28 U.S.C. § 1254(2).

Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) also cited by Appellant (Jur. St., p. 5) is likewise inapplicable to this case. In *Doran*, the Court noted that it was unclear whether the Court of Appeals had actually held a municipal ordinance there in question to be unconstitutional, since the appeal was not from a judgment on the merits but from an order affirming a preliminary injunction. This Court also questioned whether it could entertain an appeal under 28 U.S.C. § 1254(2) when the review sought was not from a final judgment. In view of its uncertainty concerning the foregoing questions, the Court dismissed the appeal. 422 U.S. at 927.

The remaining cases upon which Appellant relies (Jur. St., p. 5) to sustain its claim of jurisdiction in this case are *Sherr v. Sierra Trading Corporation*, 492 F.2d 971 (10th Cir. 1974) and *In re Federal Photo Engraving Corporation*, 54 F.2d 628 (2d Cir., 1931). Neither case has *any* relation to this Court or its jurisdiction.

For all of the foregoing reasons Appellee respectfully submits that the instant appeal is not in conformity to the provisions of 28 U.S.C. § 1254(2), therefore is not within the jurisdiction of this Court, and should be dismissed.

IF THE APPEAL IS NOT DISMISSED FOR LACK OF JURISDICTION, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE QUESTION ON WHICH THE DECISION OF THIS CASE DEPENDS IS SO UNSUBSTANTIAL THAT FURTHER ARGUMENT IS NOT WARRANTED.

In the event that this Court does not dismiss the appeal on the basis of the jurisdictional defects discussed *supra*, the judgment of the Court of Appeals sought to be reviewed should be affirmed by this Court without further argument. The best argument for affirmance is the detailed and thorough analysis of the Appellant's ordinance rendered by the Court of Appeals in its unanimous opinion. (Jur. St., pp. App. 1 to App. 8).

The whole case depends upon one question: whether the Appellant's action in withholding building permits on lots owned by Appellee was authorized by the Appellant's subdivision ordinance.

Appellant's assertion that "a monumental and absolutely untrue factual misrepresentation was foisted upon and accepted by the Circuit Court" (Jur. St., p. 9) is incorrect and irrelevant. Appellant complains that the Court of Appeals was misled into believing that the entire subdivision where the lots are located was developed by the bankrupt, Appellee's predecessor in interest, and that Appellant had never before enforced its ordinances respecting the other residences in the subdivision. Whether or not "about half of the 190 residences were built fifteen years ago by a responsible developer" (Jur. St., p. 9) and whether the Appellant enforced its subdivision ordinance against that developer fifteen years ago has absolutely no bearing on this case. What *does* bear on this case is the fact that approximately 190 families live in the subdivision, that half the subdivision was built in 1972 and 1973 by Appellee's

predecessor in interest, and that almost all of the improvements demanded by the Appellant as its price for issuing building and occupancy permits for the Appellee's lots are for the benefit of the entire subdivision, *including* the old portion of the subdivision. The Court of Appeals was not misled.

Appellant states that " . . . the most abrasive aspect of the judgment appealed from is the determination that the Village waived Section 11 of its subdivision ordinance in that the same was not specifically cited." (Jur. St., p. 10). While the Court of Appeals was correct in holding that Appellant waived any claim of lack of utility facilities or road access under Section 11 (Jur. St., p. App. 7), by failing to cite the Section, it should be noted that in fact the utility facilities and road access to the lots required by Section 11 do exist. The necessary utility facilities and roadway access presently serve the 190 families who reside in the subdivision and are available to serve the 11 lots owned by Appellee interspersed amongst those families. The fact that the requirements of Section 11 have been satisfied probably explains why Appellant never cited the Section before.

The conclusion of the Court of Appeals was rendered after extensive discussion which weighed both sides of the case most carefully. Significantly, nowhere in its Jurisdictional Statement does the Appellant show where the Court's interpretation of the ordinance was erroneous. Appellant's complaint stems from the fact that under the Court of Appeals' interpretation of the ordinance, Appellant must resort to remedies with which it is not satisfied. But no other interpretation of the ordinance is offered by the Appellant in its Jurisdictional Statement.

The only question being one of statutory construction, and the question having received full consideration by the Court of Appeals, the unanimous opinion of that Court should be affirmed by this Honorable Court without further argument.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE.

As discussed *supra*, appellate review is not the proper mode of review in this case under 28 U.S.C. § 1254(2). However, 28 U.S.C. § 2103 provides that this Court may regard and act upon papers filed in an improvidently taken appeal as a petition for writ of certiorari. Unquestionably, this Court has discretion under 28 U.S.C. § 1254(1). to review the judgment of the Court of Appeals by writ of certiorari (although it should be noted that Appellant has made no request for such review). However, Appellee respectfully submits that it would be improvident to grant a writ of certiorari as to the judgment of the Court of Appeals in this case for the judgment presents no federal question for decision. In *Wolf v. Weinstein*, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed.2d 33, reh. den. 373 U.S. 928, 83 S.Ct. 1522, 10 L.Ed.2d 427 (1963), this Court dismissed a writ of certiorari which it had granted concerning a judgment of the Court of Appeals for the Second Circuit stating that the writ had been improvidently granted because the judgment "primarily implicates questions of Pennsylvania law and presents no federal question of substance." 372 U.S. at 636. In this case, there is no federal question presented at all. Moreover, none of the considerations governing review on certiorari delineated in Rule 19 of the Rules of this Court are present in this case. Appellee submits

that since there are no "special and important reasons" (as required by Rule 19) for further review in this case, this Court should not in its discretion entertain the appeal as a petition for a writ of certiorari under 28 U.S.C. § 2103.

Respectfully submitted,

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